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No. 82-471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILMER C. JORDAN
and SHELDON R. WAXMAN,

Petitioners,

v.

VICTOR MANEIKIS,

Respondent.

On Petition For Writ Of Certiorari Or In The Alternative Mandamus To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Is an order denying leave to reinstate a previously-dismissed counterclaim appealable when: (a) it is not a final decision pursuant to the provisions of 28 U.S.C. §1291; (b) certification for interlocutory appeal pursuant to the provisions of 28 U.S.C. §1292(b) has neither been requested nor granted; and (c) a finding pursuant to Rule 54(b) of the Federal Rules of Civil Procedure regarding appealability has neither been requested nor made?

When a party and his lawyer take a clearly frivolous appeal, is it a violation of due process to assess damages pursuant to the terms of Fed. R.App.P. Rule 38 and 28 U.S.C. §1927?

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COUNTERSTATEMENT OF THE CASE

Proceedings Before The District Court

A motion to dismiss the original counterclaim was granted because the pleading was unintelligible. A motion to dismiss the amended counterclaim was denied in the following minute order:

> "Although defendant-counterclaimants Jordan and Lund are represented by counsel, their counterclaim is reminiscent of the complaint in *Dioguardi v. Durn-*

> *ing*, 135 F.2d 774 (2nd Cir. 1944); it is entitled to the same liberal construction as was Mr. Dioguardi's complaint. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). The motion to dismiss the counterclaim is denied and plaintiff-counterdefendant is ordered to answer in 20 days."

Attempts to ascertain the nature and parameters of the counterclaim were frustrated by defendants' refusal to comply with discovery. As a result of defendants' refusal to comply with orders compelling discovery, the magistrate to whom discovery had been assigned entered two separate orders recording his "strongest possible recommendation" that the counterclaim be dismissed and, *sua sponte*, ordered defendants to appear before the district court to show cause why they should not be held in contempt of court. The magistrate entered two separate orders awarding plaintiff his costs and attorneys' fees with regard to the discovery matters and, in the second order, provided that 25% of this amount should be paid by defendants' counsel* pursuant to the provisions of 28 U.S.C. §1927.

In the course of proceedings before the district court concerning these matters, Petitioner Waxman (who now represented Jordan) suggested that the counterclaim be dismissed and additional discovery be dropped. The parties thereafter met and agreed to abandon contemplated discovery relating to the counterclaim and, in return, agreed to the dismissal of the counterclaim. An agreed order was thereafter entered dismissing the counterclaim. However, six months later (at the time a co-defendant entered into a settlement agreement with plaintiff), Petitioner Waxman presented a motion seeking

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* This assessment was against Petitioner Jordan's *previous* counsel. Petitioner Waxman had not yet assumed Jordan's representation in the case.

to reinstate the counterclaim on behalf of Petitioner Jordan. (The remaining non-settling defendant, Van Metre Lund, did not join in the motion to reinstate the counterclaim although he had previously been a counter-plaintiff.)

As indicated above, there had been substantial uncertainty as to the nature of the cause of action sought to be stated in the counterclaim. The motion for reinstatement, however, for the first time explicitly designated the counterclaim as a claim for malicious prosecution.*

The District Court declined to reinstate the counterclaim, but did not enter a written order to that effect at that time. Subsequently, on October 1, 1980, Petitioner Waxman again raised the issue of reinstating the counterclaim on behalf of Petitioner Jordan. (Again, defendant Lund did not join in this motion.) This time, the District Court entered a written order denying the motion to reinstate the counterclaim, and it was from this written order denying reinstatement that Jordan appealed. (Defendant Lund did not join in the appeal.)

Proceedings Before The Court Of Appeals

After receiving a four-week extension of time, Petitioners filed a seven-page Appellants' Brief, which brief failed to contain any statement as to the basis of the court's jurisdiction. The next day after filing the brief, Petitioners filed a motion for expedited briefing and suggested that the Court dispense with oral argument.

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* The second paragraph of the two-paragraph motion for reinstatement read in its entirety:

> "A cause of action for malicious prosecution commences with a verdict in favor of the Defendant. Rather than starting anew after a favorable verdict, Jordan desires that the same jury assess the motivation of Plaintiff for filing and continuing with this lawsuit, which is at the crux of the allegations of the counter-claim."

Plaintiff filed his Appellee's Brief and argued, *inter alia*, that Petitioners were attempting to take an appeal from a non-appealable order. Plaintiff further asserted that he was entitled to relief pursuant to Rule 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. §1912. Petitioners never filed, nor sought to file, a reply brief.

Meanwhile, in response to Petitioners' suggestion that oral argument be dispensed with, the Court of Appeals requested the parties to file statements concerning the need for oral argument. In response to this request, Petitioners reversed their previous position and asserted that oral argument was appropriate. In a subsequent motion filed by Petitioners, Petitioners clarified that the total amount of time required for oral argument of this appeal by Petitioners would be *one minute*. ("Jordan's Motion To Set Oral Argument For June 15, 1981" is reproduced in the Appendix hereto.)

After reviewing the briefs, the record, the parties' statements concerning the need for oral argument, and Petitioners' motions in that regard, the Court of Appeals took the case on the briefs and handed down the decision which is the subject of the instant Petition. Petitioners responded to the Court's decision with a Petition For Rehearing With En Banc Suggestion. In that petition, Petitioners suggested for the first time that the order might be appealable under the "collateral orders" exception of *Cohen v. Beneficial Industries Loan Corp.*, 337 U.S. 551 (1949). Petitioners limited themselves to an argument by assertion in this regard, and made no attempt to explain how the order denying reinstatement of the malicious prosecution counterclaim fit within the *Cohen* exception. The petition was denied.

REASONS FOR DENYING THE WRIT

1. The decision below regarding the non-appealability of the order in question is so plainly correct as to require no argument; indeed, Petitioners did not even *claim* that the order in question was appealable under either 28 U.S.C. §1291, 28 U.S.C. §1292(b), or Fed.R. Civ.P. Rule 54(b). The assertion (made for the first time in the petition for rehearing) that the order was appealable under the collateral order doctrine has never been explained and does not withstand scrutiny: The refusal to reinstate a counterclaim for malicious prosecution presents no important or unsettled question of law; does not lose the ability to be reviewed effectively once a final judgment is entered in the entire action; is not separate and independent of the main cause of action; and presents no danger of denying the appellant his day in court. To the contrary, Petitioner Jordan, as a matter of law, is not entitled to *commence* an action for malicious prosecution until he first wins the underlying suit. The Petition raises no legitimate question, much less one of sufficient moment to merit this Court's consideration.

2. There is nothing novel nor of constitutional dimension about the lower court's application of Fed.R.App.P. Rule 38 and 28 U.S.C. §1927 to the facts of this case, nor in its having done so on the basis of the briefs and the record without first having held a one-minute oral argument. Again, the Petition fails to raise a substantial question.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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